LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
DEC 29 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

NO. 478

WILLIAM G. STRATTON, CHARLES F. CARPENTIER, ELBERT S. SMITH, JOSEPH D. LOHMAN and C. ARTHUR NEBEL, substituted for GRENVILLE BEARDSLEY, deceased,

Petitioners,

vs.

LAR (AMERICA FIRST) DALY,

Respondent.

PETITIONERS' PETITION FOR REHEARING.

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 N. La Salle Street, Suite 900,
Chicago (1), Illinois, (FI 6-2000),
Counsel for Petitioners.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
EDWARD A. BERMAN,
Assistant Attorneys General,
Of Counsel.

Printed by Authority of the State of Illinois

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

NO. 478

WILLIAM G. STRATTON, CHARLES F. CARPENTIER, ELBERT S. SMITH, JOSEPH D. LOHMAN and C. ARTHUR NEBEL, substituted for GRENVILLE BEARDSLEY, deceased,

Petitioners,

vs.

LAR (AMERICA FIRST) DALY,

Respondent.

PETITIONERS' PETITION FOR REHEARING.

Petitioners respectfully but earnestly ask this court to reconsider its order denying *certiorari* because, as briefly but we think clearly appears below, the question presented is one of far more than usual importance and the opinion of the Court of Appeals decides that question in a way that is contrary to the teachings of this and other courts' decisions upon the point.

I.

The order of the district court reinstating this case on a motion filed, not within 10 days under Federal Rule of Procedure 59, but after 10 days under Rule 60, was clearly appealable even though it did not dispose of the merits of the case.

As is demonsfrated in the petition for *certiorari* (Point II, pp. 11-23), the rule in the federal courts, as well as the practice at common law, in chancery, and in most other jurisdictions, has heretofore always been that an order vacating a judgment or decree *within term time* is not final and not appealable, no matter how clearly erroneous it may be; and can not be reviewed until the court has entered a judgment or decree that is final and appealable. *Hume* v. *Bowie*, 148 U. S. 245, discussed in the petition for *certiorari* at page 18, *Board of Supervisors* v. *Knickerbocker Ice Co.*, *per* Judge Learned Hand, 80 F. 2d 248, *Glinski* v. *United States*, 93 F. 2d 418, *Smith* v. *Gorlo*, 52 F. 2d 848, and other authorities cited in the petition (pp. 11-23).

But once term time has passed, an order vacating a judgment or decree so far disturbs rights that are so far vested that the order is appealable even though it does not dispose of the case on the merits.

All of the cases cited in the paragraph next above hold or recognize this to be the law.

The presently standing opinion of the court of appeals in this case makes it possible for a district court to enlarge the time for appeal from a judgment, not by entertaining a motion under Rule 59, but by entertaining such a motion *at any time* under Rule 60.

If this is to be a principle of Federal appellate judicature, this court should so declare. As matters stand now the opinion of the Court of Appeals for the Seventh Circuit in

this case is at war with the teachings of the cases cited above.

II.

This case is of far more than usual importance.

Applications for relief from judgments under Rule 60 are common and orders vacating judgments under Rule 60 are likewise rather frequent.

These orders disturb rights that are so far vested that they can only be overturned by the special showing required by Rule 60.

The decision of the Court of Appeals for the Seventh Circuit, which contradicts the teachings of the cases cited under Point I, *ante*, thus precipitates a conflict on the question whether such orders are appealable before the case has been retried or otherwise reconsidered and redetermined by the district court.

This Court should resolve this conflict and authoritatively decide this important question.

Prayer for Rehearing.

For these reasons petitioners respectfully ask this Court to grant a rehearing in this case.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 N. La Salle Street, Suite 900,
Chicago (1), Illinois, (FI 6-2000),
Counsel for Petitioners.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
EDWARD A. BERMAN,
Assistant Attorneys General,
Of Counsel.

Certificate of Service.

I, Raymond S. Sarnow, one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that, on or before December 28, 1962, I served copies of the foregoing petition for rehearing or modification of this Court's opinion and judgment as follows:

By mailing three copies of said petition to

Lar Daly
844 W. Vermont Ave., Chicago 43, Ill.

Howard Newcombe Morse
5501 W. Washington Blvd., Chicago 44, Ill.

in duly addressed envelope, first class, postage prepaid.

.....

RAYMOND S. SARNOW,

One of Attorneys for Respondent.